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ELİG
LOKMANHEKİM • GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

March 2015 - May 2015

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Preface to the March 2015 Issue

Unsurprisingly, the first quarter of 2015 witnessed the enactment of a plethora of new legislation, along with multiple significant court decisions. This issue, corporate law section examines the representation novelties introduced for companies, regarding the methods to be used by the board of directors while assigning their duties.

Competition law section examines several Turkish Competition Board ("Board") decisions. The first issue examined through these decisions is the resale price maintenance analysis and whether the Board has shifted its strict per se approach. Secondly, the Board's THY decision on allegations of predatory pricing and obstructing competitors' market activities are discussed. Finally, the competition section delves into the EU directive on antitrust damages actions, intending to unify EU antitrust rules through common standards.

The litigation section examines a Constitutional Court decision that can have significant ramifications regarding the rule of law: execution of court orders. The internet law section too analyses a decision of the Constitutional Court which prevented an amendment to the law with severe potential consequences on freedom of expression.

Finally, the white-collar irregularities section delves into a matter dear to the hearts of managers of companies active in Turkey: the managerial liability issues under Turkish anti-corruption law.

This issue of the Legal Insights Quarterly addresses these and several other topical legal and practical developments, all of which we hope will provide useful guidance to our readers.

March 2015

Corporate Law

Novelties on Representation of Companies

The Law on The Amendment of the Labor Law and Specific Laws and Decree Laws and Restructuring of Specific Receivables numbered 6552, issued in the Official Gazette dated September 11th, 2014 and numbered 29116, introduced certain amendments to the Turkish Commercial Code ("TCC") regarding the representation and binding of the companies.

As per the new regulation, the board of directors in joint stock companies (and the board of shareholders in limited liability companies), will be entitled to assign the management, wholly or partially, to one or several directors of the board or to third persons by stipulating a provision under the articles of association and issuing an internal directive. Therefore, the board of directors is granted with the authority to assign members of the board who are not authorized to represent the company or assign the persons who are employed by the company as commercial representatives with limited authority, in case there is an explicit provision under the articles of association.

Within the scope of the aforementioned article, the term "limited authority" means monetary limitations and limitations such as making transactions only before specific corporations and institutions. For instance, regulations providing powers on representation of the company in any and all capacities by two members of the board with their joint signature are deemed as "unlimited authority". In these cases, signature circulars may be issued in accordance with a board resolution on representation and binding, without the need for any internal directive regulation. However, in the event that the authorities of the signatories are limited with specific transactions and specific institutions in the signature circular, such signature circular should be issued according to the new regulations. Therefore, companies wishing to issue new signature circulars or to amend their existing signature circular should follow the route explained below in detail.

If the articles of association of the company does not allow the board of directors (or in case of a limited liability companies, the board of shareholders) to assign their authorities, the articles of association should be amended to add a provision allowing for such assignment.

Following this amendment, authorities of the persons who will be assigned as representatives with limited signature powers shall be clearly identified in the internal directive, which will be issued by a board of directors' resolution. However, signature groups and names of the authorized persons will not be stated under the resolution, only signature powers will be listed. The board of directors resolution shall be registered by the Trade Registry and announced in the Turkish Trade Registry Gazette.

The names and surnames, ID numbers of the persons who will be assigned as signatories and their signature groups shall be determined by a separate resolution of the board of directors at a later stage, with reference to the date and number of the internal directive. In this second resolution, at least one of the members of the board of directors should be granted with unlimited signature authority to represent and bind the company. For instance, a provision stating that the company can be represented by two members of the board with their joint signature to the widest extent possible shall be stipulated thereunder. This resolution shall also be registered with the Trade Registry and announced in the Trade Registry Gazette.

What Does the New Communiqué on Squeeze-out/Right to Sell in Public Companies Bring?

Controlling shareholders' right to squeeze out

the minority shareholders ("Squeeze out Right") and those minority shareholders' (or investors') right to sell (put) their shares to the controlling shareholder ("right to sell" or "sell-out") in public companies were first introduced under the "Communiqué on Rights to Squeeze out and to Sell" ("former Communiqué") numbered II-27.1[1]. Since its enactment, the former Communiqué received considerable criticism, pre-dominantly from the investors, and in particular on the price scheme front.

The Capital Markets Board of Turkey has responded to such criticism by introducing a new communiqué ("new Communiqué")[2] within the same year as the former Communiqué.

The new Communiqué reshuffled the squeeze-out/sell-out mechanics in a rather substantial manner. We hereby summarize some of these amendments[3] :

Investors first, please

Under the former Communiqué, both the squeeze-out and sell-out rights could be triggered and exercised simultaneously. With the new Communiqué, the rights are still triggered simultaneously; however, investors have the first turn to exercise.

The New Communiqué provides investors with a three-month window, during which they can exercise their right to sell, whereas the controlling shareholder cannot squeeze them out until the end of that period.

The squeeze-out right becomes exercisable by the controlling shareholder within three-days, following the expiry of the above mentioned window.

New price mechanics

The new Communiqué sets forth different pricing mechanisms for squeeze-out and right to sell, unlike the former Communiqué.

(i) Squeeze-out price

The price (applicable in the cases of both squeeze-out and right to sell) under the former Communiqué was the weighted arithmetic average of the stock market price established during the thirty-day period, prior to the announcement made by the controlling shareholder. The new Communiqué kept the above thirty-day weighted arithmetic average of the stock market price, but rendered it applicable only for squeeze-outs, while providing the investors with a 'higher-of' price mechanism for their right to sell, hence a safer net.

It shall also be noted that the above mentioned squeeze-out price will be determined for each publicly traded share group separately.

Also, the squeeze-out price applicable to non-floating shares of a listed company will be the same as the squeeze-out price to apply for floating shares. In case there is more than one floating share group, the arithmetic average of such squeeze-out prices will be applied to the non-floating shares.

(ii) Sell-out price

Under the new Communiqué, in the event the investors opt to sell their shares to the controlling shareholder, the higher of the following prices will be applied:

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[1] ELIG – Legal Insights Quarterly, March 2014 / May 2014, 'The Controlling Shareholders' Right to Squeeze out the Other Shareholders and Rights to Sell in Public Companies'

[2] 'Communiqué on Rights to Squeeze out and to Sell' numbered II-27.2, published in the Official Gazette dated November 12, 2014 and numbered 29173

[3] We hereby regard only the companies whose shares are publicly traded and not the companies subject to the Capital Markets Law without any floating shares.

1) The squeeze-out price;
2) The price determined under the mandatory valuation report;
3) The price applied to a mandatory tender offer, exercised within the last 12 months, if any;
4) The weighted average stock market price established during the last 6 months;
5) The weighted average stock market price established during the last 12 months;
6) The weighted average stock market price established during the last 5 years.

New threshold where no privileges apply

The new Communiqué increased the voting right percentage, giving rise to squeeze-out and sell-out rights. The former threshold of 95% is increased to 97% until January 1st, 2018, and to 98% to be applicable onwards.

In contrast with the former Communiqué, where the share (voting) privileges had been taken into consideration during the calculation of the above-mentioned threshold, under the new Communiqué, the privileges do not matter.

Competition Law / Antitrust Law

Turkish Competition Board is One Step Closer to the Rule of Reason Approach with respect to Resale Price Maintenance

Two recent decisions indicated that the Turkish Competition Board ("Board") has a tendency to analyze the market structure, competition level and effect on consumers when assessing a resale price maintenance behavior of a supplier. In *Çilek* (20.08.2014; 14-29/597-263) and *Dogati* (22.10.2014;14-42/764-340), the Board did not apply a *per se* approach in its analysis, and rather adopted a closer to the "rule of reason" approach by taking into account the market dynamics, the relevant competitors' position and the welfare of the consumers.

In *Çilek*, Çilek Mobilya Sanayi ve Pazarlama Ticaret A.Ş. ("Çilek Mobilya") and its authorized dealers in production, sale and marketing of the children's bedroom and accessories sector was subject to a preliminary investigation based on the allegations that Çilek Mobilya restrains competition through determining its dealers' resale price. Although in the agreements between Çilek Mobilya and its dealers, the Board found evidence of resale price maintenance (Çilek Mobilya required its dealers to comply with the recommended resale prices), the Board, upon analyzing the invoice samples of the dealers, determined that authorized dealers are free to determine their own resale prices in practice. The Board indicated that there is no evidence that the dealers are obliged to apply the prices determined by the supplier. Within this framework, the Board decided not to launch a full-fledged investigation but simply sent the supplier a warning to revise its agreements to avoid the relevant clauses on compliance with the recommended prices.

Another significant recent Board decision on point concerns the *Dogati* decision. In *Dogati*, Dogati Gıda Tur. Paz. Tic. Ltd. Şti. ("Dogati Gıda"), which operates in the fast-food sector, was subject to a preliminary investigation based on the allegation that Dogati Gıda dictates resale prices of its franchisees through the franchise agreement. The Board evaluated that the competitive effects of Dogati Gıda's involvement in the resale price of its franchisee specifically (i) encourages retailers to offer broader services, (ii) decreases the uncertainty of demand and (iii) enables consumers to supply their products from a significant number of buyers by eliminating competition among buyers. Additionally, the Board found that (i) intra-brand competition in the market for fast-food is highly concentrated, (ii) Dogati Gıda's market share in this market is low and (iii) no competitive concerns arise in terms of inter-brand competition. Upon evaluating the foregoing facts, the Board concluded that Dogati Gıda's interference with its franchisee's resale price is reasonable and resolved that such practices do not give rise to anti-competitive concerns.

As consistent with its position in the recent years, these decisions demonstrate that the Board has taken a shift from its strict *per se* approach in terms of the resale price maintenance analysis.

The Turkish Competition Board Clears Turkish Airlines from Violation Allegations

The Turkish Competition Board ("Board") recently closed a significant investigation and cleared the Turkish flagship carrier Turkish Airlines from the abuse of dominant position allegations. The Board did not find a violation on the part of Turkish Airlines. The Board stated that it lacked sufficient evidence to establish the required conditions of the alleged violation.

The accusations against Turkish Airlines included a violation of Article 6 of Law No. 4054 (abuse of dominance). Pegasus Hava Taşımacılığı A.Ş., a low-cost rival, complained to the Board that Turkish Airlines engaged in abusive behavior through predatory pricing, obstructing rivals' flights and other operations. The case was an extension of an older full-fledged investigation in 2011 in which the Board had closed the investigation for lack of merit in the claims, without imposing any administrative monetary fine against Turkish Airlines (30.12.2011; 11-65/1692-599). The Ankara Administrative Court repealed the 2011 investigation decision, on the grounds that the Board analysis on Turkish Airlines' pricing behavior should be conducted in a more detailed and sophisticated way. Consequently, the Board had to reopen the case in 2013. Following another round of full-fledged investigation, the Board, once again, did not find a violation on the part of Turkish Airlines.

While the reasoned decision is not published yet, the short form decision stipulates that Turkish Airlines is dominant in some routes inbound from Istanbul. According to the decision, these routes' pricing by Turkish Airlines is below avoidable costs. The decision further indicates that while defining the geographic market, the Board adopts a city-based or an airport-based approach. The short form decision gives special hints about the Board's tendency while defining geographic markets in the airline transportation sector.

Consequently, the Board concluded that Turkish Airlines' pricing behavior could not be considered as predatory pricing. The Board also rejected other allegations of hindering competitors' market operations and did not find them to be persuasive.

The case is a benchmark precedent candidate on the Board's increasingly demanding approach to allegations of predatory pricing and obstructing competitors' market activities. The reasoned decision, which is expected to be published in the following months, is likely to provide insight on the relevant geographic market definitions concerning the airline transportation sector in which different definitions are possible.

EU Directive on Antitrust Damages Actions[4]

In the EU, antitrust damages actions have so far been few and mostly focused in certain countries such as the United Kingdom and Germany. The European Court of Justice has repeatedly held that those who suffer harm due to infringement of competition law has the right to seek damages [*e.g.* see C-453/99 *Courage and Crehan* (20.09.2001); Joined cases C-295/04 to C-298/04 *Manfredi* (13.07.2006); C-360/09 *Pfleiderer* (14.06.2011); C-199/11 *Otis and Others* (06.11.2012); C-536/11 *Donau Chemie* (06.06.2013) and C-557/12 *Kone* (05.06.2014)]. The latter case has been called as a ground-breaking case for allowing victims

[4] Available at http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf

of "umbrella pricing"[5] to obtain compensation for the loss caused by the cartel members, even in the absence of contractual links with them.[6]

On November 10th, 2014, the European Council of Ministers adopted the European Commission's ("Commission") proposal for a Directive on Antitrust Damages Actions ("Directive"). The Directive was published in the Official Journal of the European Union on December 5th, 2014 and went into effect on December 26th, 2014.

The Directive intends to unify EU antitrust rules by introducing common standards. It aspires to encourage individuals who have suffered harm as a result of the violation of competition law to resort for compensation to the Member State in which they reside or where they suffered the harm. The essential amendments that will be implemented in the Member States' laws focus on six areas which are summarized below.

Right to full compensation: The Member States need to ensure that a natural and legal person who has suffered harm because of an infringement of antitrust law would be able to claim and obtain full compensation, covering actual loss, loss of profits plus payment of interest.

Access to documents: In an effort to create a unified standard for access to the evidence in all Member States, national courts have the right to order the disclosure of a certain type of evidence in terms of the "necessity and proportionality of disclosure measures". Special care will be taken, however, to ensure the necessity and proportionality of this disclosure, as well as the protection of confidential information.

[5] Prices charged by competing suppliers that were not members of the cartel which were higher than they would otherwise have been without the cartel.

[6] This is provided that certain conditions are satisfied and that it is for the Member State courts to determine whether these conditions are met.

Binding effect of national antitrust decisions: All final decisions of a national competition authority finding an infringement of antitrust law directly constitute proof and the infringement is irrefutably established before the courts of the same Member State.

Limitation periods: In order to eliminate disparities among the Member States, the minimum limitation period for damage claims is set at five years. The limitation period only begins to run after the infringement has ceased and the claimant knows or can reasonably be expected to know (i) the relevant infringing act and that it constitutes an infringement, (ii) that the infringement caused damage to the claimant, and (iii) the identity of the infringer.

Joint and Several Liability: The Member States are obliged to ensure that the undertakings which infringed antitrust law through joint behavior, particularly in cartel cases, would be held liable severally and jointly. As a result of this, claimants are able to initiate a claim against any of the participants of the cartel. Moreover, the infringing undertaking, against which the claim was initiated and by which the compensation was paid (if the claim is accepted), has the ability to recover it from any of its co-cartelists. However, this rule has certain exceptions concerning the immunity recipients and the small or medium-sized companies.

Passing on Defense: The Directive introduces the principle that only the actual loss at one specific level of the supply chain is considered while considering the compensation. Therefore, infringers are able to defend themselves against a damage claim by proving that the overcharge was partially passed on by the claimant to its own customers.

The Member States have two years (until November 2016) to adapt their national laws in order to conform to the standards set out in the Directive. It remains to be seen whether the Directive will reach its objectives and whether it will create an increase in actions for damages across the European Union.

Labor Law

Can Employees Initiate a Lawsuit for Collection of Receivables without Specifying Their Claims?

Article 107 of Civil Procedures Law numbered 6100 (the "Law No. 6100") regulates that a plaintiff may initiate a lawsuit for the collection of receivables without specifying its claims ("unspecific lawsuit") only if; (i) it is impossible to determine the claims precisely and conclusively; or (ii) the plaintiff cannot be expected to determine the claims precisely and conclusively.

The said regulation of Article 107 was introduced to Turkish legislation with Law No. 6100 and it means that, unless the plaintiff does not meet the abovementioned criteria, it is not possible to initiate an unspecific lawsuit.

Consequently, since the introduction of the said regulation, courts have been dismissing unspecific lawsuits which fail to meet the criteria above. It is crucial to indicate that the courts will evaluate whether or not the above criteria are met on case-by-case basis.

In terms of labor law however, courts have a tendency to presume that employees can never be expected to determine their claims precisely and conclusively due to the fact that most of the documents and information required to determine employees' claims are in possession of employers and out of employees' reach; and thus accept unspecific lawsuits initiated by employees without evaluating whether the above criteria are met or not.

That being said; the 22nd Civil Chamber of the Court of Appeals has recently rendered a principal decision dated November 11th, 2014 and numbered 2013/21949 M. 2014/32355 D. (the "Decision"). According to the Decision, since the plaintiff employee knows his duration of work and his latest salary, he is in a position to determine the amount of his request for notice period compensation precisely and conclusively and therefore not entitled to initiate an unspecific lawsuit; the lawsuit was dismissed based on procedural grounds.

This Decision displays the nature of Article 107 of the Law No. 6100 whose aim is to enable plaintiffs to seek their rights even if they cannot determine the amount of their claims. It also indicates that the sole fact that employees' salaries are often in dispute would not mean that employees cannot determine their claims precisely and conclusively.

Litigation

Constitutional Court Says No to Legislation Rendering Court Decisions Futile and Ineffective

The Constitutional Court was presented with two separate repeal requests on the Law on Amendment of Labor Law and Certain Laws and Decree Laws and Restructuring Debts ("Law No. 6552"), which is amending two different legislations [*i.e.* Administrative Jurisdiction Procedures Law No. 2577 ("Law No. 2577") and Privatization Law No. 4046 ("Law No. 4046")]. The amendments brought by Law No. 6552 have one thing in common that is, vesting the relevant governmental institution with discretionary power to choose not to execute a court order or to delay the execution thereof. The Constitutional Court concluded that such power breaches the Constitution on the grounds that the right to legal remedy cannot endure without the execution of court orders.

The amendment to the Law No. 2577 is on Article 28(1), which grants Ministries and its Affiliates the right to delay the execution of court orders on matters of appointment, dismissal, replacement, change of duty and title of officials in police organization by two years. The amendment to the Law No. 4046 is on Provisional Article 26(1), by which Privatization Administration is entitled to refrain from executing courts' cancellation

orders for the return of privatized assets, regarding the final transfer to investors completed at least five years prior to September 11, 2014, except where such cancellation orders relate to breaches of relevant transfer of operation rights agreements.

The amendments on both legislations give the relevant institutions discretionary power over the execution of court orders, hindering exact and prompt execution. Evidently, the legislator upholds the administration without any regard to the implications those legislations may impose on applicants. For instance, an official may have to wait for two years to reap the benefits of a court order or an applicant obtaining a court order for the return of privatized assets may be unable to enjoy the legal consequences which are actually available through this court order since Provisional Article 26(1) of Law No. 4046 rules out execution.

The Constitutional Court highlighted that the right to legal remedy, granted by the Constitution, requires a court order to inure effect and be executed exactly and promptly, and hindering due execution of a court order renders the right to legal remedy against administrative acts/actions pointless and futile considering that a court order bears no effect and does not provide the relief sought by the applicant if not executed duly. In addition, the Constitutional Court indicated that the abidingness principle stipulated under Article 138 of the Constitution, does not give administrative institutions the right or discretionary power to choose not to execute a court order or to delay execution thereof, to wit, the administration must abide by court orders without any exception.

Ultimately, the Constitutional Court concluded that the amendment on Article 28(1) of Law No. 2577 and Provisional Article 26(1) of Law No. 4046 are in breach of Article 2, 36 and 138 of the Constitution, and restored the power and effect of court orders that were upset fundamentally.

Internet Law

Recent Amendment Proposal to the Turkish Internet Law

On January 19th, 2015 an omnibus bill was sent to the Turkish Grand National Assembly ("TGNA"), which includes a significant amendment to the Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ("Law No. 5651").

A new provision (*i.e.* Article 8A) for removal of content and/or access ban if failure to do so might result in delay and cause irreparable damages is proposed to the Law No. 5651. The proposed provision states the judge may decide on the removal of content and/or access ban depending on one or more matters among right to life, security of life and property of people, protection of national security and public order, prevention of crimes or protection of public health. Furthermore, the foregoing provision states that access ban and/or removal of content broadcasted on the Internet may be decided by the Telecommunication Communication Presidency ("Presidency") if failure to do so might result in delay and cause irreparable damages, upon the request of relevant ministers due to protection of Prime Ministry, preservation of national security and public order, prevention of crimes or protection of public health. With the foregoing proposed amendment, Presidency will immediately notify the decision to the access providers, relevant content and hosting providers. Access ban and/or removal of content decision shall be complied with immediately and within four hours from notice at the latest. Access ban decisions within the scope of this article will be given by access ban to the content method, only for the part, section, broadcast where the personal right violation occurs (URL, etc.). Access ban decisions on an entire website may be rendered if access ban of the content related to the violation is not technically possible or the violation may not be prevented through access ban of the relevant content.

Removal of content and/or access ban decision given by the Presidency upon the Prime Ministry or related ministries will be presented to the approval of criminal judgeship of peace judge by the Presidency within twenty four hours and the judge shall announce its decision within forty eight hours, if not, the decision will be void per se, if the proposed provision will enter into force as is.

It is also proposed that the Presidency to file a criminal complaint to the public prosecutor against people, who create and disseminate the internet contents subject to the crime within the scope of this provision. The information needed to identify the perpetrators of these crimes will be provided by content, hosting and access providers to the judicial authorities upon the decision of the judge. The authorized persons of the content, hosting or access providers which do not provide such information, will be fined with judicial fine from three thousand days up to ten thousand days, provided that the action does not result in another crime, which necessitates a heavier penalty.

Finally, it is proposed that the access providers, relevant content and hosting providers, who fail to comply with removal of content and/or access ban decision granted within the scope of this article, shall be imposed an administrative fine of TL 50,000 up to TL 500,000.

On October 2nd, 2014 the Constitutional Court cancelled certain articles of Law No. 5651 which were amended on September 11th, 2014 and one of the cancelled provisions was also about the access ban procedures of the internet content, in order to protect "national security, preservation of public security and prevention of crime".

The cancelled Article 8/16 was as follows: "Access ban shall be executed by The Presidency upon the order of The President, if failure to do so might result in delay and cause irreparable damages due to one or more matters among national security and preservation of public security, prevention of crime. Access providers shall enforce the request received from The Presidency within four hours at the latest. The access ban decision given by the President shall be presented to the approval of criminal judgeship of peace judge within twenty four hours by The Presidency. The judge shall announce its decision within forty eight hours".

The Constitutional Court declared its reason for cancellation as follows: "Internet has an essential instrumental value for exhaustion of fundamental rights and freedoms, especially the freedom of expression in modern democracies. Therefore, it is clear that the states and administrative authorities must be extremely sensitive in the regulation and practice for internet which became one of the most effective and widespread methods to express thoughts" and added that "there is a risk that the Presidency may access ban entire websites based on national security and preservation of public security, prevention of crime" which would be deemed a disproportionate measure. The decision further indicated that the authority granted to judges for granting access ban decisions within the scope of violation of private life is limited with the procedures regulated under Article 9 of the Law No. 5651, but the authority granted to the Presidency was neither limited nor specified.

The proposal appears to be a more comprehensive and extended version of the cancelled provision, and it is against the laws as (i) it grants the administration to the authority to render access ban decision, which should be deemed as an intervention to freedom of expression, (ii) the scope of the administration's authority and the reasons for the right to use such authority is ambiguous and wider, (iii) it may lead to arbitral

implications by the administration, as there is no prior judicial review. Moreover, contrary to Constitutional Court decisions which stated that access ban to an entire website is against freedom of speech and accordingly the Constitution; the proposed provision entitles to access ban an entire website if access ban of the allegedly illegal content related to the violation is not technically possible or the violation may not be prevented through access ban of the allegedly illegal content.

As of February 13th, 2015, the omnibus bill is still pending for enactment and accordingly the proposed Article 8A has not been enacted yet.

Telecommunications Law

Constitutional Court's Decision on ICTA's Authority to Regulate Data Protection in the Electronic Communication Sector Is Now Effective

In 2013, the Council of State applied to the Constitutional Court for annulment of Article 51 of the Electronic Communication Law No. 5809 ("Law No. 5809") which had authorized the Information and Communication Technologies Authority ("ICTA") to regulate the principles and procedures for the processing of and protecting privacy of personal data in the electronic communications sector by claiming that the procedures and basics for protection of personal data can only be regulated by law pursuant to Article 20 of the Constitution, and that the provision subject to their claim is against the Turkish Constitution.

The Constitutional Court reviewed the Council of State's application and accepted the request for annulment of Article 51 of the Law No. 5809 with its decision of April 9th, 2014. The Constitutional Court stated in its reasoned decision that *"Pursuant to inalienability of legislative power, authorization of rulemaking cannot be directly and at first hand transferred on the matters that are explicitly stated in the Constitution. The provision which delegates the power to regulate the principles and procedures on processing and protection of privacy of personal data in the electronic communications sector to the authority which is also the subject of the case is against Article 20 of the Constitution"*.

The Constitutional Court based its decision regarding the annulment of Article 51 of Law No. 5809 on Article 20 of the Constitution, which requires the principles and procedures of protection of personal data to be regulated by law. The Constitutional Court also stated that regulation of these matters through a regulation is against the protection provided by the Constitution and that the legislative authority Turkish Grand National Assembly may not delegate its authority for regulating the protection of personal data to another authority. The Turkish Constitutional Court's decision was published in the Official Gazette of July 26th, 2014 but its entry into force was postponed for six months.

The six-month period has now expired and the relevant decision became effective as of January 26th, 2015. Accordingly, Article 51 of Law No. 5809 is now cancelled. The Constitutional Court clearly emphasized that protection of personal data may only be regulated by law, but not by a regulation or other secondary legislation issued by the public authorities. Therefore, the regulations issued by ICTA based on this article will also be deemed null and void as of July 26th, 2014.

The most essential regulation pertaining to data protection issued by the ICTA based on its authority under Article 51 was the Regulation on Processing and Protection of Privacy of Personal Data in the Electronic Communications Sector ("Electronic Communications Regulation"). The Electronic Communications Regulation brought substantial provisions especially within the

scope of the Directive No. 2002/58 of the European Union and regulated the principles and procedures for processing, retention and protection of privacy of personal data in the electronic communication sector to be complied by the operators operating in the electronic communication sector. On the other hand, the data protection requirements under this regulation raised problems for companies who are providing electronic communication services, and affected free flow of data, since it prohibited transfer of personal data out of Turkey. The Electronic Communications Regulation is now null and void along with other relevant regulations issued by ICTA, as of January 26th, 2015.

The timing of the effective date of the Constitutional Court's decision is quite significant, since the Turkish Prime Ministry finally submitted its proposed Draft Law on Protection of Personal Data, which was pending since 2003 and which will be the first comprehensive data protection specific law enacted in Turkey, to the Turkish Grand National Assembly ("TGNA"). The Draft Law on Protection of Personal Data is expected to enter into force in the near future, after being discussed and negotiated before the TGNA. The Draft Law, when entered into force, would be the primary legal source for and apply in priority to the matters regarding data protection and privacy, including the electronic communications sector, which lacks a regulation pertaining to data protection since cancellation of Article 51 of Law No. 5809 as of the effective date of the Constitutional Court's decision.

Advertisement Law

The New Regulation on Commercial Advertisement and Unfair Commercial Practices

After the enactment of the Consumer Protection Law numbered 6502 on May 28th, 2014, a group of new regulations were introduced as secondary legislation under the Consumer Protection Law. Another regulation has been brought to light on January 10th, 2015; the Regulation on Commercial Advertisement and Unfair Commercial Practices ("New Regulation") published in the Official Gazette and entered into force on the publication date except for one article. The New Regulation superseded the Regulation on Principals and Implementation Fundamentals Regarding Commercial Advertisements and Announcements ("Abolished Regulation").

The New Regulation, for one, introduces a broader scope than the Abolished Regulation by governing subtitles and fixed wordings to be used in visual advertisements, footnotes in written advertisements as well as unfair commercial practices.

With this article, we aim to provide an overview of the significant amendments introduced with the New Regulation.

Comparative Advertisement

Indeed, Article 8 of the New Regulation while demonstrating an in depth description of comparative advertisements, in contrast to the Abolished Regulation, allows the use of competitors' names, trademarks, logos or other distinguishing marks or expressions along with competitors' trade names and business names in comparative advertisements provided that such advertisements comply with the provisions set forth in the same article, namely:

(i) they are not misleading and deceptive, (ii) they do not cause unfair competition, (iii) the goods and services compared have the same qualifications and respond to the same demand or need, (iv) the issue compared is beneficial to the consumer, (v) one or more material, essential, verifiable and typical properties of the compared goods or services, including the price, are compared in an objective way, (vi)

assertions based on objective, measurable and numeric data are proved by scientific tests, reports or documents, (vii) they are not discrediting or denigrating the competitors' intellectual and industrial property rights, commercial name, company name, other distinguishing marks, goods, services, activities and other features, (viii) when comparing goods or services whose origin is indicated, goods or services compared are from the same geographic origin, (ix) they do not cause confusion between advertisers' and competitors' brand, commercial name, company name or other distinguishing marks and goods or services.

Further to the same article, names, trademark, logos or other distinctive graphics or expressions, trandenames of competitors can only be displayed in comparative advertisements provided that they comply with the foregoing criteria. That being said, this Article 8/2 will enter into force one year after the publication of the New Regulation.

Burden of Proof

The New Regulation not only requires the advertisers to evidence specifications, assertions or illustrative expressions as to verifiable matters in their advertisements but also imposes on the advertisers the obligation to prove the foregoing by reports to be obtained from the relevant departments of universities or accredited test and assessment institutions or independent research institutions, in parallel with the current practice of the Board of Advertisement.

Price Information

Prices of goods and services mentioned in commercial advertisements will be subject to advanced requirements as of the enactment of the New Regulation. In a nutshell, monetary specifications used in advertisements will have to comply with the following;

(i) In the event that the price or the price calculation method of a good or service is covered in advertisements, the price information provided must be related to the advertised good or service and consumers must not be misled by providing deficient information on the price or by way of causing confusion.

(ii) The price provided to the consumers in advertisements must be the total sales price including all taxes applicable to the good or service.

(iii) If the tax, duties, charges or price cannot be calculated due to the consumer's age, sex, health condition or relevant legislation, the advertisement must expressly state that the foregoing elements are not included in the price and the calculation method of the total price must be indicated.

(iv) Sales price in advertisements must be specified as "Turkish Lira", "TL" or "" except for abroad package tours, overseas studies or overseas transportation and accommodation advertisements.

(v) In the event that there are costs that should be paid by consumers due to the delivery of the good or service, consumers must be informed of the amount or of the calculation method if the amount is not definite.

(vi) In the event that the price of the good or service is based on another good or service, the conditions to be fulfilled by the consumers in order to benefit from the advertised price must be expressly stated.

(vii) In advertisements containing installment amounts, total price of the advertised good or services and the number of installments will have to be demonstrated in a readable size and along with the installment amount or be audibly expressed.

(viii) If the advertisements promise the delivery of a good or service to consumers free of charge in case the consumer fulfills certain conditions, the latter must be expressly indicated in the main message of the advertisement.

(iv) If there is a time or stock limit concerning the validity of the price, such time or stock limit must be expressly specified in the advertisement.

Prohibition of Healthcare Professionals from Appearing in Commercial Advertisements

One of the most striking amendments brought by the New Regulation is the prohibition of healthcare professionals from appearing in commercial advertisements.

As per paragraph 3 of Article 16, advertisements shall no longer contain images, statements or references concerning a health statement by doctors, dentists, veterinaries, pharmacists and healthcare institutions with respect to a good or service or shall not give such an impression in this regard.

Audible statements, visuals, footnotes and subtitles

Without any doubt, when it comes to visual, written and audible statements in advertisements, the New Regulation adopts a more detailed approach in its Articles 18, 19, 20 and 21.

In this regard, as per the recent amendments, fixed wordings, footnotes and subtitles shall appear at the minimum in advertisements in written or visual channels and shall not be in contradiction with audible statements, visuals and with each other. Also, the size of the subtitles and fixed wordings shall comply with the standards covered under Article 19 while provisions of Article 20 shall be taken into consideration for the duration of subtitles on screen.

As per Article 21, exaggerated, complex, italic fonts and effects, shadowing and other techniques that complicate the reading cannot be used in advertisements. Moreover, while positioning footnotes, subtitles and fixed wordings in advertisements, texts should not make any visuals incomprehensible or vice versa.

Implicit Advertisement

As in the Abolished Regulation, implicit advertisements are forbidden in all kinds of audible, written or visual platforms under the New Regulation. This being said, the New Regulation takes it one step further and comprehensively addresses the assessment of implicit advertisement.

In the assessment of articles, news, broadcasts and programs containing names, brands, logos or other distinguishing signs or expressions pertaining to goods or services as well as commercial names and company names and information and visuals regarding the institution or person representing the foregoing from the perspective of implicit advertisement, the following are taken into consideration: (i) whether the foregoing is coherent, literal and proportionate to the articles, news, broadcasts and programs containing them in terms of format, subject, content, presentation, positioning and duration, (ii) whether the articles, news, broadcasts and programs published within the scope of giving, disseminating and obtaining information meet the consumers' demand of disclosure and receiving information, (iii) that they do not promote the rental or purchase of the goods and services through special promotional references to the goods and services that may consciously divert consumer preferences.

Unfair commercial practices

The third section of the New Regulation introduces the concept of unfair commercial practices which involves misleading acts (*Article 29*), misleading neglects (*Article 30*) and aggressive commercial practices (*Article 31*), and consequently prohibits them in commercial advertisements.

Article 29 describes misleading acts as *"the commercial practices that contain wrong information or that mislead or may mislead the average consumer while the information is correct when all circumstances regarding the presentation are taken into consideration and therefore cause or may cause the consumer to enter into a legal transaction that he/she would not enter into under normal circumstances."*.

On the other hand, Article 30 describes misleading neglects, as *"circumstances where the person on the commercial side, for the sake of entering into a legal relationship, hides a significant information in an offer made to the consumer, presents the offer to the consumer in an incomprehensible way or at an inappropriate time, does not disclose to the consumer the purpose of a commercial practice that the purpose is apparent and where the foregoing causes or has the potential to cause the consumer to enter into a legal transaction that he/she would not enter into under normal circumstances."*.

Lastly, as per Article 31 *"circumstances where the person on the commercial side, for the sake of entering into a legal relationship, harasses or exposes the consumer to physical coercion or unfair impact and where the foregoing causes or has the potential to cause the consumer to enter into a legal transaction that he/she would not enter into under normal circumstances"* are considered as aggressive commercial practices.

Along with the additional examples listed in foregoing articles, the appendix of the New Regulation also provides the "Sample Practices Considered as Unfair Commercial Practices".

Real Estate Law

Challenges in the Implementation of the Legislation Regarding the Transformation of Areas under the Risk of Disaster

The Law No. 6306 on the Transformation of Areas under the Risk of Disaster ("Law") and the Regulation on the Application of the Law No. 6306 ("Regulation") (collectively, "Legislation") have been widely enforced since their entry into force. The Ministry of Environment and Urban Planning announced that the year 2014 counted over 79,000 applications and the rent allowances paid in 2014 exceeded TL 250,000. On the other hand, the implementation of the Law and the Regulation is still exposed to risks and problems for right holders due to the challenges in the Legislation as will be explained below.

The Power of Majority

The Legislation first seeks the unanimous decision of all the property owners for the new project (land amalgamation, individual or combined or building block-based implementation, construction of a new building, sale of shares, revaluation of the shares against flat or through revenue sharing or otherwise) once a building is determined as risky. If the property owners cannot reach a unanimous decision, 2/3 of the owners, *pro rata* their shares, are entitled to decide and notify the non-accepting owners that their shares will be sold to the accepting owners by auction over the current value or, that their shares will be transferred to the Treasury if their shares cannot be sold to the accepting owners. The Regulation clearly explains the roadmap for the sale by auction, while remaining silent on the tools to be used against the decision of the said 2/3. Therefore, the non-accepting 1/3 is not equipped with legal instruments to object to the decision of the 2/3 majority. The Legislation does not either provide any mechanisms to assess the fairness and equity of the majority's decision and this majority's power is prone to abuse. For instance, hypothetically, the majority may decide to demolish the building and ask other owners to pay exorbitant amounts for constructing a new building. Consequently, the 1/3 may be bound to accept the majority's decision or sell their property, which may be interpreted as a "take it or leave it" situation.

Redistribution of Land Shares

Another criticism about the practice of the Legislation is that the land shares may not be fairly redistributed among the owners. While the location, surface area and value of the apartments must be taken into consideration when constructing a new building, these may be ignored by the contractors in practice and the new land shares may be redistributed in an unfair manner. This disproportionality caused a significant number of actions in adjustment of land shares. To avoid this, the distribution of land shares should be clearly indicated in the agreements among the owners and the contractor.

Inequality among Lessees

Pursuant to the Legislation, the owners or limited real right holders or the lessees that have been residing in the building for more than a year may receive temporary residence, workplace allocation or rent allowance. The Legislation is silent about the situation of the lessees that have been residing in the building for less than one year. This provision is criticized for creating inequality among the lessees and for not protecting those residing in the building for less than a year. The only tool available to these lessees is the general provisions concerning lease agreements, while their evacuation is governed by a very specific and particular Legislation.

Ambiguity in the Wording

The Regulation stipulates that the owners of the buildings evacuated following an agreement may receive temporary residence or workplace allocation instead of rent allowance provided that it is possible. One may argue that the wording "possibility" creates ambiguity which contradicts the principles of certainty and predictability of the laws.

No Intervention in the Contractor – Owners Relationship

The Legislation does not intervene in the contractual relationship between the contractor and the owners. While the contract is indeed subject to the principle of freedom of contract, the Legislation does not provide any protection for the owners against contractors who do not fulfill their obligations in time or deliver a poorly constructed building. Therefore, to avoid loss of rights and unjust treatment of both parties, the contract between the contractor and the owners must clearly indicate the issues such as the zoning status, the project, the distribution of apartments, liabilities of the parties, a calendar for the construction works and licensing, transfer of deeds, technical specifications, consequences and penalties for not delivering the building in agreed time.

Shorter Period of Objection:

The Law entitled the right holders to make an objection to the administrative actions within 30 days following the date of notification and the objection procedure is as stipulated in the Law No. 2577 on the Administrative Procedure ("Law No. 2577"). On the other hand, the general objection period is 60 days in the Law No. 2577. The Legislation is therefore criticized to offer a shorter period of objection to the administrative actions under the Legislation.

Efficiency of the Relevant Authorities

The property owners may object to the determination of their building as risky within 15 days following the date of notification by submitting a petition to the Infrastructure and Urban Transformation Directorate ("Directorate"). While the objection period is relatively short, it may take months for the Directorate to assess and respond to the objection in practice. This may prove to be dangerous considering the possible risk ratio of the building in question and may constrain the contractors from fulfilling their obligations in due time.

Demolition: How?

The process of demolition of risky buildings, either by the owners or the administration, is not regulated under the Legislation.

Constitutionality

The implementation of the Legislation has impacts on the fundamental rights of the persons involved and the rules of implementation are at the hands of the administration. Due to this impact, one may argue that the rules of implementation should be determined by the law and the fundamental rights should not depend on the administration's act.

Intention vs Reality

Finally, the implementation of the Legislation is criticized to disregard the reason behind the idea of transformation. Ideally, such legislation should aim transforming the urban panorama to offer better living conditions to the residents and should not only involve the re-construction of buildings but also the amelioration of the surrounding areas and the infrastructure. This being said, the common perception and the practice of the Legislation suggest that the main objective of the Legislation appears to be reconstruction of buildings.

In light of the foregoing, Legislation may undergo amendments to mend the abovementioned challenges for a better implementation to meet its *raison d'être*.

White Collar Irregularities

Managerial Liability Resulting from International and Turkish Anti-Corruption Legislations

Anti-corruption compliance has become a globally popular topic in the last few years. This is mainly because of the enactment and enforcement of the crime of "bribery of foreign public officials". This crime generally stipulates that corporations engaging in bribery of public officials in a foreign country, wherever that may be in the world, will be punished in their home countries. The US Foreign Corrupt Practices Act ("FCPA") of 1977 is the pioneer of the enactment of the aforementioned crime, followed by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") of 1999. However, what made anti-corruption efforts as popular as they are today is the aggressive enforcement of the FCPA whose record fines could easily amount to a billion dollars, combined with fines imposed in other jurisdictions and legal fees.

It is not just the amount of fines imposed on companies that make anti-corruption compliance efforts so popular. It is also personal liabilities that have to be faced by the managers or employees of the company. Ranging from approximately 15 months to 15 years in prison[7] and criminal fines typically reaching millions of dollars, criminal anti-corruption liability may be faced by real persons who engage in bribery through company operations. Adding to this criminal liability, members of the board of directors and the C-suite executives might also face civil liability towards the company and its shareholders. Such civil liability may arise due to the breach of their duty of care while discharging their managerial duties. Given the OECD Foreign Bribery Report's finding that 53% of the foreign bribery cases involve corporate management or CEOs[8], managers should be increasingly diligent with respect to their criminal and civil liabilities arising from domestic and foreign bribery crimes.

[7] http://www.fcpablog.com/blog/2012/2/28/a-survey-of-fcpa-sentences.html

[8] http://www.oecd.org/daf/oecd-foreign-bribery-report-9789264226616-en.htm

Furthermore, the doctrine of willful blindness as exercised under the FCPA increases the chances of persons exercising managerial duties to be prosecuted. Section 78dd-1 (f) (2) of the FCPA provides that *"knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believed that such circumstance does not exist."* Therefore, in addition to the situations of actual knowledge of bribery, the FCPA also sanctions situations where red flags were present with regard to certain third parties (such as distributors, lawyers, agents, custom brokers *etc.*) and the company authorized payments to third parties (*e.g.* payments to an offshore account) ignoring these red flags, which in turn result in corrupt payments. However, the company and consequently its managers may not be held liable under the willful blindness doctrine through engaging in third party due diligence while determining the company's third party agents. The third party due diligence includes steps such as the examination of (i) whether the prospective third party is experienced in the area it is retained for, (ii) the reputation of the prospective third party, (iii) the prospective third party's close ties with public officials, (iv) whether the terms of service of the prospective third party is explicitly stated in the agreement and (v) continuous monitoring of the third party with regard to the aforementioned steps. The company and the managers can shield themselves from third party liability through acting in accordance with the red flags the due-diligence steps may uncover, and refuse to work with certain third party partners where necessary.

Recently, both Alcoa and Alstom enforcement actions were subject to liability arising from the corrupt acts of the third party agents of the company. In January 2014 Alcoa pleaded guilty for corruption charges due to, among others, its attempt to secure public contracts in Bahrain, through a middleman it retained with a sham distributorship agreement. Similarly, in December 2014 Alstom pleaded guilty for corruption charges due to, among others, its attempt to conceal corrupt payments to foreign public officials realized through persons hired as consultants.

Managerial Liability under Turkish Law

In addition to the aforementioned extraterritorial liabilities that might be experienced by multi-national companies active in Turkey and their managers, Turkish anti-corruption laws would also be applicable. As per Article 252 of the Turkish Criminal Code No. 5237, bribery occurs when an individual, *directly or via intermediaries*, provides benefit to a public official or another person who the public official suggests, in relation to the execution of the public official's duty to perform or not to perform a certain act. Accordingly, the use of intermediaries (such as distributors, lawyers, agents, custom brokers *etc.*) would be deemed bribery for the real or legal persons who authorizes such bribery. Since Turkish criminal law does not recognize corporate criminal liability, the criminal law consequences of corrupt acts would be mainly imposed on the real persons behind the corrupt acts within scope of the operations of the company they are representing. The company as a legal person would face an administrative fine between TL 14,969 (approximately Euro 5,346) and TL 2,994,337 (approximately Euro 1,071,192). The real persons in turn, could be punished with an imprisonment sentence from 4 to 12 years.

In addition to the criminal liability that might arise, the managers and the members of the board of directors of a company may also be subject to civil liability towards the company they represent in general. According to Article 553 of the Turkish Commercial Code No. 6102 ("TCC") if the managers and the members of the board of directors of a company (in addition to founders and

liquidators) breach their obligations arising from the law and the articles of association, then they will be liable to the (i) company, (ii) the shareholders of the company and (iii) the creditors of the company. The occurrence of such liability is contingent on the fault of the managers and the members of the board of directors, and the existence of damages. Article 553 furthermore stipulates that those who have delegated their authorities to others can be liable from the acts and decisions of the persons they delegated their authorities to. However, such liability may only arise in the case that those delegating their authorities have not engaged in moderate care, while choosing the persons they delegated their authorities. Finally, according to the article, no one can be held liable for violations of the law and the articles of associations or corruption beyond their control. Such non-liability cannot be justified by way of the aforementioned duty of care.

There are no High Court of Appeals' decisions regarding a corruption related enforcement of Article 553. However, the article can be easily employed for the compensation of the (i) company, (ii) the shareholders and (iii) the creditors, in case the managers or the members of the board of directors of the company cause harm to the aforementioned through corrupt acts. To give a specific example, a member of the board of directors (A), might be held liable for damages by the creditors of the company, if A does not exercise reasonable care while delegating its powers to manager B, who then authorizes the bribe of public official C through the customs broker it (B) retained. Needless to say, the meaning of "moderate care" will be distilled through judicial decisions. However, in practice, the duty of reasonable care that should be exercised by A while delegating manager B can be similar to the aforementioned third party due diligence that the company (and the managers / members of the board of directors) should engage in while retaining third parties for its business.

Conclusion

The discussion above demonstrates that the real persons authorizing corrupt payments would also be subject to severe criminal and civil liabilities, in addition to the legal persons, under the applicable laws. Under Turkish law, such liabilities might be faced especially by the persons with the authority to represent the company (such as managers and members of the board of directors). This is because in case it can be proven that the managers and the members of the board of directors did not engage in reasonable due diligence while delegating their authorities, then they would be liable for the acts of the delegates which cause damages to the company in general. A similar liability is also possible under willful blindness doctrine of the FPCA, where a company and/or its managers fail to engage in due diligence while determining the third party agents of a company (*e.g.* architects, lawyers, customs brokers, distributors *etc.*). Therefore, in determining whether such liability arises, both third party due diligence and exercising the duty of reasonable care play an important role. Both of these concepts point that the managers, while determining persons to delegate their duties and third party agents, should be vigilant and diligent in order to exclude criminal and civil liability.

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Çitlenbik Sokak No: 12 Yıldız Mah. Beşiktaş 34349, Istanbul / TURKEY
Tel: +90 212 327 17 24 • Fax: +90 212 327 17 25
www.elig.com